Supreme Court No.84132-2

C/A Nos. 27394-6-III
(consolidated with 27395-4-III)

SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Termination of D.R. and A.R.

CHILDREN'S JOINT OPENING BRIEF

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I. INTRODUCTION

As the Oklahoma Supreme Court noted 30 years ago, "[t]he matter of independent representation by counsel, so that a child may have his own attorney when his welfare is at stake, is the most significant and practical reform that can be made in the area of children and the law." *In the Matter of T.M.H.*, 613 P.2d 468, 470 (Okla. 1980) (all children have a constitutional right to counsel in termination of parental rights cases).

Recognizing that termination of parental rights proceedings ("TPRs") are among the most intrusive and destructive legal proceedings to which any child or adult could ever be subjected, the courts and/or legislatures of all but a small number of states now mandate counsel for children in TPRs and dependencies. However, most children in TPRs in Washington, like Petitioners D.R. and A.R., do not have an attorney to protect their vital physical and other fundamental liberty interests when the State seeks to permanently sever their relationships with their families. While this Court has yet to address whether foster children have a constitutional right to counsel, it has recently expressed serious concern about the plight of these children when they lack trained legal representatives:

> [W]e strongly urge trial courts in this and similar cases to consider the interests of children in dependency, parentage, visitation, custody, and support proceedings, and whether

> appointing counsel, in addition to and separate from the appointment of a GAL, to act on their behalf and represent their interests would be appropriate and in the interests of justice. Cf. RCW 13.34.100(6); RCW 26.09.110; King County Local Family Law Rule 13.
>
> When adjudicating the "best interests of the child," we must in fact remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless.

In re Parentage of L.B., 155 Wn.2d 679, 712 n. 29, 122 P.3d 161 (2005).

Outside of TPRs and the underlying dependency actions, there are few if any legal proceedings that impact so many areas of an individual's life and liberty—proceedings that turn over almost all decisions about one's life to the State, require years of court involvement, monthly interactions with a State agent, and the constant risk of placement in another stranger's home or an institution for reasons which may be unknown to the child and which may have more to do with the State's fiscal or administrative interests than the child's welfare. Furthermore, unlike almost any other criminal or civil proceeding, there is little certainty when State involvement will end, with cases lasting up to 18 years—an entire childhood.

Our state and federal constitutions' strong protection of individual rights and family integrity would not tolerate such an invasion by the State into the lives of adults without the protection of an attorney. Likewise, our

constitutions cannot allow such an unguarded invasion into the lives of children, who have the most at stake in these life-altering proceedings.

II. ASSIGNMENT OF ERROR

The State has conceded that the trial court erred in failing to appoint counsel to the Children. Thus, this issue is not before the Court and the sole issue on review is whether all children have a constitutional right to counsel in termination of parental rights proceedings.

III. STATEMENT OF THE CASE

In early 2004, the Children's mother, a victim of domestic violence, voluntarily placed D.R. and A.R. (the "Children"), into foster care in order to protect them from her abuser. CP 3; RP 648, 679. Shortly after entering foster care, the Children were appointed a volunteer Court Appointed Special Advocate (CASA) whose duty it was to provide the court with her opinion of what was in the best interests of the Children—to be the "eyes and the ears of the court." RP 431-32.

While in state care, D.R. experienced at least four different placements, while her younger brother, A.R., experienced at least thirteen, including commitment in the most restrictive psychiatric institution for children in the state. RP 48, 53, 56, 57, 59, 60, 73, 441, 520, 550. The record shows the Children's behavior deteriorated while being shuffled between placements and both were accused of vandalizing property,

stealing, harming family pets, and being physically and sexually inappropriate with other children in home and at school. RP 38, 53, 67-69, 180, 196-99, 321-28. While in foster care, the Children endured the loss of continuity in community, education and health care services, questionable administration of psychotropic drugs, drastic reduction or cessation of all contact with each other and their mother, and enforced isolation from relatives and friends. RP 94, 97, 100, 462; Supp. CP Ex. 18.

Although the Children were examined by a neuropsychologist who made comprehensive treatment recommendations, these were not implemented. CP 31-44; Supp. CP Ex. 18. As to D.R., the neuropsychologist identified significant learning disabilities and recommended a treatment plan and a revised Individualized Education Plan (IEP). CP 38-41. In a 2007 report, the neuropsychologist, upset that her recommendations had not been followed, once more "strongly recommend[ed] treatment for [D.R.'s] language disorder[,]" stating that, "[i]t is bewildering why no one who had access to this report three years ago took action to get [D.R.] the treatment she needed." CP 37. The 2007 report repeatedly noted that D.R.'s IEP had not been revised nor had it addressed the neuropsychologist's concerns that D.R.'s earlier Attention-Deficit Hyperactivity Disorder diagnosis was incorrect. CP 37-39.

Similarly, the neuropsychologist questioned A.R.'s diagnoses and medications and stressed the importance of continuity in both placement and mental health treatment. Supp. CP Ex. 18. Instead, the State placed A.R. in 13 different placements in which he suffered "total and complete emotional breakdowns," was treated by over eight different mental health therapists, and finally confined (without a court order) to a psychiatric facility for over a year. RP 53-54, 266, 307, 310, 329, 552; CP 48.

After four years in state custody, the Children had no prospect of a permanent home. RP 118, 498-99. Nevertheless, the State petitioned for termination of parental rights on May 11, 2007. CP 1-8. At the termination trial in April 2008, the CASA testified that she had never met A.R. (then almost 11 years old) and had not seen D.R. (then 12 years old) since "early 2004". RP 485-87, 489. The CASA testified that she had met with D.R. "at most" three times since she was assigned the case four years prior, and the longest visit lasted 45 minutes. RP 431, 486. When the CASA met with D.R., she did not ask D.R. about her feelings about her mother or whether D.R. wanted to visit her mother or return to her care. RP 485, 489. The CASA testified that D.R. had consistently told her foster parents that she wanted to resume visitation with her mother and that she wanted a relationship with her mother. RP 426, 490. Nevertheless, at trial, the

CASA argued for termination (RP 474-75), a position contrary to D.R's expressed interests. RP 489-90.

At trial, the Children's mother requested appointment of counsel for D.R.—the court denied the request. RP 165, 410-11, 417, 419, 427. In granting the State's termination petition, the trial court, recognizing that the neuropsychologist's recommendations had not been implemented, stated that the Children had been "under-served" by Washington State's Department of Social and Health Services (DSHS). RP 771. The court's finding that termination was in the Children's best interests because their mother lacked the skills necessary to meet their high needs was based, in part, on the State's failure to provide services to the Children. RP 778-79. Parental rights were terminated on August 25, 2008. RP 4, 784.[1]

The Children's mother timely appealed the termination order and asked the Court of Appeals to appoint appellate counsel for the Children, which it did.[2] On appeal, the Children argued that because state law makes the appointment of counsel for dependent children discretionary, the State fails to protect the due process rights of all dependent children guaranteed

[1] In addition to this summary, Petitioners incorporate by reference the facts as set forth in their briefs below.

[2] Ct. App. Div. III Letter, *In re Dependency of D.R. and A.R.*, Consolidated Case Nos. 273946 and 273954 (Mar. 16, 2009).

by article I, section 3 of the Washington Constitution and the 14th Amendment of the United States (U.S.) Constitution.[3] The State, in its response brief to the mother, initially argued that no error was committed.[4] However, after the Children submitted their opening briefs to the Court of Appeals, the State conceded that the termination was in error. Specifically, the State noted that "the trial court abused its discretion in denying legal counsel for A.R. and D.R.; that this error may well have affected the outcome of the case..."[5]

The State admitted that D.R. opposed the termination and that her "significant legal concerns were not represented" at trial by the Children's volunteer CASA—a non-attorney guardian ad litem (GAL)—and that the CASA did not have the ability to advocate for D.R.'s legal position.[6] The State further admitted that A.R. "also had significant legal issues" and "[l]ike D.R., [he] was not able to adequately present a legal argument to

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[3] "No person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, § 3. "No State shall ... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV.

[4] Br. of Respondent 33-35, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (April 30, 2009).

[5] Mot. to Reverse and Remand Case to Superior Court 1-2, *In re Dependency of D.R. and A.R.*, No. 27394-6-III consolidated with No. 27395-4-III (July 1, 2009).

[6] *Id.* at 2.

the court opposing termination because he did not have counsel."[7] In its concession, the State noted that its failure to appoint counsel to D.R., whose mother had requested appointment, and to A.R., for whom the issue of counsel had never been raised at or prior to trial, was not harmless error.[8] The State recommended reversal[9] but opposed any consideration by the Court of Appeals or this Court of the Children's claim regarding all dependent children's constitutional right to counsel. The Court of Appeals reversed and remanded the case, but did not rule on the constitutional issue presented by the Children.[10] This Court accepted review of the issue, narrowing it as set forth above.[11]

IV. ARGUMENT

A. STANDARD OF REVIEW

Whether due process requires that children be provided an attorney in termination proceedings is a matter of law reviewed *de novo*. *City of Kennewick v. Benton County,* 131 Wn.2d 768, 771, 935 P.2d 606 (1997).

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[7] *Id.* at 2-3.

[8] *Id.* at 3.

[9] *Id.* at 1-5.

[10] Order Denying Motion to Modify Commissioner's Ruling, No. 27394-6-III consolidated with No. 27395-4-III (Sept. 14, 2009).

[11] Order, C/A Nos. 27394-6-III (consolidated with 27395-4) (June 2, 2010).

B. FEDERAL AND STATE COURTS HAVE AFFIRMED CHILDREN'S CONSTITUTIONAL RIGHT TO LEGAL COUNSEL IN TERMINATION PROCEEDINGS

> The rights and sometimes the interests of children are frequently jeopardized in court proceedings because the best interests of a child are determined without resort to an independent advocate for the child. Courts may fail to perceive children will be affected by the outcome of the litigation, or that potential conflicts between the interests of the children and the interests of other parties require that the child have separate counsel.

Matter of T.M.H., 613 P.2d at 470.

While legislative enactments of a right to counsel for children of all ages in the vast majority of states have likely limited courts' consideration of this issue,[12] courts have increasingly recognized children's constitutional right to counsel in TPR and dependency proceedings. As discussed below, federal and state courts in Alabama, Oklahoma, New York, and Georgia have found a due process right to counsel for all children in TPRs under either the state or federal

[12] Nearly 40 states provide a statutory right to counsel for children in dependency proceedings, including TPRs. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 610-11 (2009) (noting that South Carolina is the only state to require an attorney in dependencies, but not TPRs); *see also, e.g.*, First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children*, 2nd ed. 2009, *available at* http://www.firststar.org/documents/Final_RTC_2nd_Edition.pdf.

constitutions, and no court in almost 30 years has ruled that any child *lacks* such a constitutional right in TPRs.[13]

The only two federal courts to address this issue have found an absolute right to counsel in TPRs. The most recent court to rule on this issue held in 2005 that children in all deprivation proceedings (including TPRs) have a constitutional due process right to counsel. *Kenny A. ex rel v. Perdue,* 356 F. Supp. 2d 1353 (N.D. GA 2005).[14] The ruling in *Kenny A.* provides the most comprehensive and thorough analysis of this issue. Applying the *Mathews v. Eldridge*[15] due process balancing test, the *Kenny A.* court found that children's physical liberty is at stake in these

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[13] In addition to courts and legislatures, numerous entities have called for counsel to be provided to children in dependencies and TPRs. American Bar Association, *ABA Standards of Practice for Lawyers who Represent Children in Neglect and Abuse Cases* (1996), *available at* http://www.abanet.org/child/repstandwhole.pdf; National Association of Counsel for Children, *Recommendations for Representation of Children in Abuse and Neglect Cases*, at 4 (2001), *available at* http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf; Lisa Hunter Romanelli et al., *Best Practices for Mental Health in Child Welfare: Parent Support and Youth Empowerment Guidelines*, 88 Child Welfare League of Am. 189, 202 (2009), *also available at* http://www.thereachinstitute.org/files/documents/CWMHGuidelinesWeb3.09_000.pdf, at 20; Children's Bureau, Admin. on Children, Youth and Families, Dept. of Health and Human Servs., *Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children*, VII-11 (1999), *available at* http://web.archive.org/web/20030307092103/www.acf.dhhs.gov/programs/cb/publications/adopt02/02adpt7.htm.

[14] In *Kenny A.*, unlike the present case, dependent children were appointed attorneys, but excessive caseloads made effective legal representation impossible. *Id.* at 1356.

[15] 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976).

proceedings, as well as their fundamental liberty interests in "maintaining the integrity of the family unit and in having a relationship with [their] biological parents." *Id.* at 1360. The court also found these interests could not be protected by the parent, who has an inherent conflict with his or her child, and who has allegedly abused or neglected the child. *Id.* at 1358-59. Additionally, the court found the child's interests could not be protected by the foster care agency, whose "institutional concerns ... may conflict with the needs of the deprived child." *Id.* at n. 6.

The *Kenny A.* court also found there was a significant risk of erroneous decisions in dependencies and TPRs, errors not mitigated by juvenile court judges or CASAs. *Id.* at 1361. Finally, noting that the government had fiscal and administrative interests at stake, the court found that the government's "overriding interest is to ensure that a child's safety and well-being are protected," and that "such protection can be adequately ensured only if the child is represented by legal counsel throughout the course of deprivation and TPR proceedings." *Id.*

Almost 30 years before *Kenny A.,* a different federal court came to the same conclusion. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976). In its ruling, the court adopted the reasoning of *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L. Ed. 2d 527 (1967), in which the U.S. Supreme Court held that due process required independent counsel for children

subject to delinquency proceedings which may result in the child's institutional placement. *Id.* Reviewing the *Gault* decision, the *Roe* court stated that "[m]uch the same reasoning applies to a neglect determination proceeding." *Id.*[16] The *Roe* court then found that judges should appoint counsel for foster children at public expense if the parents are indigent. *Id.*

State courts have also found such an absolute constitutional right. As noted above, the Oklahoma Supreme Court has held that the appointment of counsel for children in TPRs was constitutionally required. *Matter of T.M.H.*, 613 P.2d at 470-71. The court found:

> In a termination proceeding, if a child is not represented by independent counsel, each attorney presents his arguments from the viewpoint of his client, with the child caught in the middle. Beneath each side's argument in terms of the best interests of the child, lies the desire to prevail for a client, who is not the child. When the court appoints an attorney for the child, testimony is presented and cross-examination done by an advocate who is only interested in the welfare of the child.

Id. at 470.[17]

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[16] *See also In re H.R.C.*, 286 Mich. Ct. App. 444, 458, 781 N.W.2d 105 (2009) (citing *In re C.R.*, 250 Mich. Ct. App. 185, 197-98; 646 NW2d 506 (2001) (supporting the proposition that "[a]lthough the constitutional provisions explicitly guaranteeing the right to counsel [for children] apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.")).

[17] The Oklahoma Supreme Court twice expanded this holding. *See In the Matter of the Guardianship of S.A.W.*, 856 P.2d 286, 289 (Okla. 1993) (expanding holding in *Matter*

In 1993, in the most recent state case to rule on this specific constitutional issue, a New York appellate court found that children not only have a constitutional right to counsel in abuse and neglect proceedings (including TPRs which arise out of those proceedings), but, like the holding in *Kenny A.,* that children are also entitled to *effective* assistance of counsel. *In the Matter of Jamie T.T.,* 191 A.D.2d 132, 599 N.Y.S.2d 892 (Ct. of App. NY 1993) (emphasis added). Analyzing the issue under the *Mathews* due process balancing test, the *Jamie T.T.* court held that it "would be callously ignoring the realities of [the child's] plight during the pendency of this abuse proceeding if [the court] failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process." *Id.* at 136.

A small number of older decisions recognized the constitutional underpinnings of counsel for children, but found there were circumstances where such counsel might not be necessary.[18] For example, in 1976, the

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of T.M.H. to private parental TPRs where counsel for child could have presented evidence regarding child's interest in maintenance of parental ties); *In the Matter of the Adoption of K.D.K.,* 940 P.2d 216 (Okla. 1997) (failure to appoint counsel for child on petition for adoption was fundamental error).

[18] In 1979, a New Jersey intermediate appellate court held that independent counsel was not required where the "issue of removal will be resolved without litigation or dispute." *Doe v. State,* 165 N.J. Super. 392, 408, 398 A.2d 562 (1979). In 1981, a North Carolina court held that counsel for a child was not required if the parent lacked counsel. *In re Clark,* 303 N.C. 592, 600-01, 281 S.E.2d 47 (1981). Because TPR trials are rarely

Oregon Court of Appeals held that appointment of counsel in TPRs was required only where counsel "can act in the traditional role of an advocate, or where the record produced by the additional parties is not sufficiently complete to permit the court to make a decision based upon the best interests of the child." *In the Matter of D.*, 24 Or. App. 601, 610, 547 P.2d 175 (1976). Also in 1976, the Pennsylvania Supreme Court found appointment of counsel for children in TPRs was required only when the child's interest was inadequately protected by the court or other parties, but also noted that "[t]his Court has not been referred to any authority which argues that such representation is constitutionally required." *Matter of Kapcsos*, 468 Pa. 50, 59, 360 A.2d 174 (1976). Both of these decisions not only predated the creation of the *Mathews* due process balancing test, but they were also made irrelevant by subsequent legislative enactments of a right to counsel for children in dependencies and TPRs,[19] a statutory right not provided to children in Washington.

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resolved without litigation or dispute and always involve counsel for parents, these holdings would require appointment of counsel for all or virtually all children in TPRs. New Jersey and North Carolina subsequently enacted a statutory right to counsel for all children in their states. N.J. Rev. Stat. §§ 9:6-8.23, 9:6-8.21; N.C.Gen.Stat. § 7B-601.

[19] Or. Rev. Stat. § 419B.195; 42 Pa. Cons. Stat. § 6311.

Importantly, the courts finding an absolute constitutional right to counsel in TPRs did so without regard for the child's age.[20] These courts, finding inherent conflict between the parties, also rejected the argument that counsel for the State or parent, or the court, adequately protected a child's legal interests. *S.A.W.*, 856 P.2d at 289 (citing *Matter of T.M.H.*, 613 P.2d at 471). Further, the *Kenny A.* court found such a right despite previous appointment of a non-attorney GAL. 356 F. Supp. 2d at 1359.

C. UNDER THE *MATHEWS* BALANCING TEST CHILDREN HAVE A RIGHT TO COUNSEL IN TPRs

Whether children in TPRs have a due process right to counsel is an issue of first impression in Washington. To determine what process is due in specific contexts, *Mathews v. Eldridge* requires the consideration of three factors: (1) the private interest at stake, (2) the risk that the procedure used will result in error and the probable value of additional or substitute procedural safeguards, and (3) the government's interest in the procedure

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[20] Many of these children were very young: in *S.A.W.*, the child was four years old; in *T.M.H.*, five; in *K.D.K.*, eight; in *Jamie T.T.*, 13; in *Roe v. Conn*, a class of children under 16; and in *Kenny A.*, a class of children of all ages. 856 P.2d at 287-88; 613 P.2d at 468; 940 P.2d at 217; 191 A.D.2d at 132; 417 F. Supp. at 773-74; 356 F. Supp. 2d at 1353 (respectively). This Court has acknowledged the importance of the opinions of young children in legal proceedings, commenting that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Rules of Professional Conduct (RPC) 1.14, Comment 1.

used and the fiscal or administrative burden of substitute or additional procedural safeguards. 424 U.S. at 321.[21]

1. In Washington, Appointment of Counsel is Required for Children in TPRs Because These Proceedings Threaten Both Physical Liberty and Family Integrity

In *Lassiter v. Dept. of Soc. Serv's*, the U.S. Supreme Court reiterated the presumption that, "an indigent litigant has the right to counsel only when, if he loses, he may be deprived of his physical liberty." 452 U.S. 18, 26-27, 101 S.Ct. 2153, 68 L. Ed. 2d 640 (1981); *see also Tetro v. Tetro*, 86 Wn.2d 252, 254-55, 544 P.2d 17 (1975). Outside this context, the "presumption can be overcome when the *Mathews* balancing factors weigh heavily enough against that presumption." *King v. King,* 162 Wn.2d 378, 395, 174 P.3d 659 (2007).

However, in Washington, this Court has determined that counsel *must* be appointed in civil cases when an individual's physical liberty is threatened "*or* where a fundamental liberty interest, similar to the parent-child relationship, is at risk." *In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (emphasis added) (citing *In re Welfare of Luscier,* 84 Wn.2d 135, 524 P.2d 906 (1974)*; In re Welfare of Myricks,* 85 Wn.2d 252, 533

[21] *Morris v. Blaker,* 118 Wn.2d 133, 144-45, 821 P.2d 482 (1992) (in determining what process was due under Wash. Const. art. I, § 23, the court utilized the balancing test from *Mathews v. Eldridge*).

P.2d 841 (1975)).[22] Children in TPRs face the loss of both, rendering appointment of counsel mandatory.

a. *A Child's Physical Liberty is at Risk Because He or She is Physically Moved by the State Out of His or Her Parents' Home and From Placement to Placement*

Dependencies and TPRs directly threaten foster children's physical liberty. *Kenny A.*, 356 F. Supp. 2d at 1360-61 ("children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted."). In comparing dependencies and TPRs to juvenile delinquency cases, the *Roe* court likewise recognized that foster children's physical liberty is threatened:

> The Supreme Court [of the United States] held that 'the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child (citations omitted).' *Much the same reasoning applies to a neglect determination proceeding.*

417 F. Supp. at 780 (emphasis added) (citing *Gault*, 387 U.S. at 41).

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[22] *See also King*, 162 Wn.2d at 392 n. 13 (citing *Grove*, 127 Wn.2d at 237) ("Outside of cases involving a risk to a fundamental liberty interest, there is a presumption of a right to counsel only where physical liberty is at stake.").

The outcome of a TPR has drastic implications for both the parents and the children involved, but *only children's* physical liberty is threatened. The TPR may immediately or ultimately result in the child being thrust into an array of confusing and frightening situations wherein *the State* moves the child from placement to placement with total strangers, puts the child in a group home, commits the child to an institution,[23] or even locks the child up in detention for running away or otherwise violating a court order. RCW 13.34.165.[24] In fact, after TPR, children are likely to be escorted by a state agent, in a state-issued vehicle, to a state-licensed foster home. From a child's perspective, this experience must be a frightening encroachment on his or her physical liberty.

As this Court noted, the risk to children's physical liberty is further compounded by an arbitrary placement process[25] where "foster children

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[23] In this case, the State conceded that A.R.'s physical liberty was implicated when he was placed in an in-patient mental health treatment facility and that an attorney was needed to protect his liberty interests. Mot. to Reverse and Remand 3.

[24] A TPR generally means that a child can no longer physically return to his or her parent's home, whether to visit or live, without facing the possibility of contempt and detention. Ironically, the only cure is for the child to file a petition for reinstatement of parental rights, a proceeding for which the Legislature has determined the child needs an attorney. RCW 13.34.215.

[25] *See Erik Pitchal, Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 682 (2006):

> Children may be moved from placement to placement for reasons having nothing to do with what is best for that child, but because beds need to be freed for an incoming sibling group, or because the foster parent is retiring and

are 'involuntarily placed . . . in a custodial environment, and . . . unable to seek alternative living arrangements.'" *Braam v. State,* 150 Wn.2d 689, 698, 81 P.3d 851 (2003) (emphasis added) (quoting *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (comparing foster children to individuals involuntarily committed to hospitals)).[26] Because children in TPRs face the loss of physical liberty, appointment of counsel is required.

b. A Child's Entire Relationship with His or Her Family is at Risk

In addition to physical liberty interests, children subject to TPRs also have a fundamental liberty interest in "maintaining the integrity of the family unit and in having a relationship with [their] biological parents." *Kenny A.*, 356 F. Supp. 2d at 1360. This Court, too, has long recognized this fundamental right. In holding that children in paternity actions have a fundamental interest in knowing their parentage and thus a right to independent representation, this Court stated that "[i]t would be ironic to find issues of parent-child ties are of constitutional dimension when the

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> moving out of state, or because the foster parent was late for court and the judge ordered the agency to move the child. Liberty includes peace of mind, and freedom means having some measure of stability in the world around you. ...Children in foster care have a physical liberty interest at stake in ongoing dependency proceedings because these very questions about their lives are constantly at issue.

[26] *See also Kenny A.*, 356 F. Supp. 2d at 1359 n. 6 (noting the "shuffling" of children from placement to placement based on programmatic needs of DSHS such as a shortage of appropriate foster homes or overcrowding, rather than a child's needs).

parents' rights are involved but not when the child's are at stake." *State v. Santos*, 104 Wn.2d 142, 143-44, 702 P.2d 1179 (1985).[27] Furthermore, the U.S. Supreme Court has long held that the right to family integrity is not limited to parents, but *extends* to other family members as well. *See Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L. Ed. 2d 531 (1977) (emphasis added) (fundamental right to family integrity not limited to parents' rights and authority).[28]

There can be no doubt that TPRs present a grave threat to children's fundamental interest in familial bonds. Although courts in TPRs must *consider* sibling relationships,[29] once an order of termination has been entered, a child's familial relationships are extinguished.[30] As such, a

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[27] *See also* RCW 13.34.020 ("When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail."); *In re Custody of Shields*, 157 Wn.2d 126, 130, 136 P.3d 117 (2006) (Bridge, J., concurring) ("child has a constitutionally protected interest in whatever relationships comprise his or her family unit."). *See also In re Parentage of Q.A.L.*, 146 Wn. App. 631, 636-37, 191 P.3d 934 (2008) (child has "constitutional right to participate in accurately determining his paternity.").

[28] *See also Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 104 S.Ct. 3244, 82 L. Ed. 2d 462 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.").

[29] RCW 13.34.200(3).

[30] *See also In re Smith*, 77 Ohio App. 3d 1, 16, 601 N.E.2d 45 (1991) (A TPR "is the family law equivalent of the death penalty in a criminal case."); *In the Interest of F.M.*, 163 P.3d 844, 851 (Wyo. 2007).

child loses not only his parents, but also his or her connections with siblings, aunts, uncles, and grandparents.

The importance of these familial bonds "accords constitutional protection to the parties involved in judicial determinations of the parent-child relationship." *Santos*, 104 Wn.2d at 146. And this protection is clearly required "when the State seeks to terminate a parent-child relationship." *Id.* Because children in TPRs face the permanent loss of familial bonds, appointment of counsel is required.

2. TPRs Threaten A Child's Fundamental Liberty Interests, Including Health, Safety and Well-Being

Given that both physical liberty and the parent-child relationship are directly at risk in TPRs, applying the remainder of the *Mathews* test is unnecessary. However, a consideration of all of the *Mathews* factors further supports the conclusion that appointment of counsel for children is required.

As this Court unanimously held, "foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety." *Braam*, 150 Wn.2d at 699.[31] As has been noted:

[31] *See also Jamie T.T.*, 599 N.Y.S.2d at 894 (liberty interests include protection from sexual abuse).

> A dependent child's right to safety thus necessarily includes interests in accurate medical and mental health evaluations, appropriate education plans, caseworkers who are adequately trained and supervised, placements well matched to the child's needs, caregivers with relevant information and adequate skills to address the child's needs, and appropriate support services in placement to avoid disruptions and multiple moves.

Pitchal, *supra* note 25, at 680-82.[32] Beyond safety, foster children have educational rights under federal and state law, including a right to education under the Washington Constitution, as well as rights related to special education.[33] Additionally, foster children have rights related to privacy,[34] religion,[35] culture,[36] inheritance, and family support.[37]

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[32] The State underscores this point by conceding that A.R. needed an attorney at the TPR to address his legal issues related to his "treatment as a sexually aggressive youth..." Mot. to Reverse and Remand 3. As the Children explain in their briefs below, they faced legal issues related to their mental health care, education, sibling contact, placement stability, prospects for permanency, safety, possible criminal behavior and possibility of contempt sanctions. Their experiences, as the Children note in section IV(G) herein, are not markedly different from other unrepresented children in TPRs.

[33] 20 U.S.C. § 1400 et seq.; RCW 74.13.550, RCW 28A.150.510; Const. art. IX, §1; Ch. 28A.155 RCW.

[34] RCW 9.02.100.

[35] WAC 388-148-0430(3).

[36] 25 U.S.C. Chapter 21 et. seq. (Indian Child Welfare Act); RCW 13.34.040; -.070(10); WAC Ch. 388-70.

[37] *In re People In Interest of K. S.*, 33 Colo. App. 72, 76, 515 P.2d 130 (1973) (A TPR "severs permanently, not only the rights and obligations of the parent relative to the child, but those of the child as well. The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship...forever.").

Because courts' primary duty in TPRs is to determine whether termination is in a child's best interests, the rights outlined above are at stake in every TPR. *See In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999); *In re Welfare of Russell*, 70 Wn.2d 451, 423 P.2d 640 (1967). When the State fails in its duty to protect these rights and interests, foster children suffer devastating developmental, educational, and other outcomes.[38]

3. An Overwhelming Risk of Error is Inherent in TPRs in the Absence of an Attorney for the Child

As the Children briefed in the Court of Appeals, Washington's procedural safeguards in TPRs are insufficient to protect children from erroneous decisions. Under Washington's current scheme, children in

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[38] *See* Joseph Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, Abstract (2007) (citations omitted), *also available at* http://www.mit.edu/~jjdoyle/doyle_fosterlt_march07_aer.pdf, at 1 (Children in foster care are "far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population."); Mason Burley, *Graduation and Dropout Outcomes for Children in State Care (2005-2008)*, Washington State Institute for Public Policy (WSIPP), *available at* http://www.wsipp.wa.gov/pub.asp?docid=09-11-3901 (Although approximately 70 percent of state high school students graduate on time, only 30-40 percent of foster youth do so); Mason Burley, *How are the Experiences of Foster Youth in Washington State Related to WASL Assessment: 2008 Results*, WSIPP, *available at* http://www.wsipp.wa.gov/pub.asp?docid=10-04-3902 (Foster youth score lower on the WASL, are more likely to repeat grades and experience frequent school changes); Laws of 2009, ch. 235, § 1 (Legislature finds disproportionate likelihood that children aging out of foster care and those who spent several years in care will experience poor outcomes including limited earning capacity; untreated mental or behavioral health problems; criminal involvement, and early parenthood combined with second-generation child welfare involvement).

TPRs are not provided notice or an opportunity to be heard and do not have an absolute right to the appointment of counsel or even a non-attorney GAL.[39] Moreover, the risk of error in the absence of counsel for children is particularly high given the subjective "best interest" standard used in TPRs. As the U.S. Supreme Court has found, this standard is imprecise, "leave[s] determinations unusually open to the subjective values of the judge" and serves to "magnify the risk of erroneous fact finding." *Kenny A.*, 356 F. Supp. 2d. at 1361 (quoting *Santosky v. Kramer*, 455 U.S. 745, 762, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982)). Further compounding the risk, as the *Kenny A.* court noted, is the "strong empirical evidence that [the State] makes erroneous decisions on a routine basis that affect the safety and welfare of foster children." *Id.*[40]

Non-attorney GALs and volunteer CASAs cannot mitigate the high risk of error. Though helpful in providing the juvenile court with valuable information about the child's life, GALs/CASAs are not trained to, nor is it their role to, protect children's fundamental rights or to represent their

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[39] *See* RCW 13.34.090; -.096; -.100(1); -.100(6).

[40] Washington State is not immune to these erroneous decisions—the State agreed in 2004 to implement comprehensive reform of its flawed child welfare system. Information *available at* http://www.braampanel.org/.

other legal interests.[41] Rather, GALs/CASAs work for the court, not the child, and their primary function is to investigate, collect information about the child, and report this to the court.[42] They are essentially witnesses, as opposed to attorneys who are ethically bound to assist a child in "[coping] with problems of law, make skilled inquiry into the facts, or insist upon regularity of the proceeding."[43] Neither GALs nor CASAs are required to ardently *advocate* for a child's position, counsel the child,

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[41] *Veazey v. Veazey,* 560 P.2d 382, 391 (Alaska 1977) ("[GAL] services are valuable supplements to, but not a substitute for, an independent advocate for the child") (citation omitted), *superseded by statute*, Alaska Stat. § 09.65.130, *as recognized in Deivert v. Oseira*, 628 P.2d 575, 579 n.3 (Alaska 1981). One legal scholar noted:

> Proponents of attorney representation for children don't dispute the value of CASA's [sic]. But proponents ask the following question: If the parents and the agency need attorneys to properly represent their views in court, why does the child, whose entire future is at stake, need something less?. . . Children deserve the same level of representation as parents and agencies—legal representation.

John E.B. Meyers, *Children's Rights in the Context of Welfare, Dependency, and the Juvenile Court,* 8 U.C. Davis J. Juve. L.& Pol'y 267, 270 (2004).

[42] RCW 13.34.105(1) requires a GAL/CASA to, among other things, "investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child," as well as "meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court." GALs/CASAs are also required to "monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order."

[43] Taylor, *supra* note 12, at 614.

negotiate on the child's behalf, or evaluate the child's legal options.[44] Nor do GALs/CASAs owe the child a duty of confidentiality or privilege.[45]

"The basic premise of the adversary system is that the best decision will be reached if each interested person has his case presented by counsel of unquestionably undivided loyalty. There is no person more interested in a child custody dispute than the child." *Veazey,* 560 P.2d at 390-91. TPRs are adversarial proceedings in which the State must prove by clear and convincing evidence the required elements in RCW 13.34.180. This may entail testimony by expert witnesses including psychologists, therapists, law enforcement officers, and lay witnesses such as state social workers, the child's GAL/CASA, and the child's parents. Complex evidentiary issues may arise including challenges to expert reports or the introduction of child hearsay.

A child, through his or her attorney, can file pretrial motions, conduct discovery, put on and cross-examine witnesses, challenge the State's experts, object to the introduction of prejudicial or inadmissible

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[44] *See* RPC Preamble § 2. Here, the State conceded that the CASA did not "[understand] the legal impact termination would have on the [children]." Mot. to Reverse and Remand 2.

[45] *See In re Frazer,* 721 A.2d 920, 923-24 (Del. 1998) (suggesting that the child's constitutional rights were violated in a TPR where child was denied an attorney to advocate for her stated interests and appointed a CASA instead).

evidence, contest the filing of the TPR petition based on the State's failure to make reasonable efforts at reunification or otherwise challenge the State to meet its burden. An attorney can develop a theory and strategy of the case, bolstered by the facts and the law, tailored to the child's interests. An attorney can ensure the child's participation in depositions, negotiations, or pretrial conferences. An attorney can also ensure that the child is present at all hearings in which his or her interests are at issue and request the child's *in camera* testimony or a scheduling order that ensures the child's meaningful presence during such hearings or trial.

Similarly, with counsel, a child can challenge no-contact orders, lack of appropriately structured visitation with parents, siblings or other family members, inappropriate or multiple placements, the adequacy and efficacy of services provided by DSHS (including the professional standards of evaluators and providers), or the administration of psychotropic medications. An attorney can enforce a child's right to due process before admission to institutions and advocate for the least

restrictive alternative.[46] Furthermore, an attorney can advocate for the child's federal and state rights to special education and public benefits.[47]

With an attorney, a child can ensure that the issues important to him or her, such as continuity of relationships, will be made known to the court and advocated for and that the State made reasonable efforts to provide the child and her or his family with appropriate remedial services deemed necessary for reunification as required by RCW 13.34.180(d).[48] And with an attorney, a child is more likely to achieve permanence.[49]

A TPR will impact all of these legal rights and interests as well as the continuation of a child's relationship with the State. Attorneys have

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[46] *See, e.g., State ex rel. Richey v. Super. Ct.*, 59 Wn.2d 872, 876, 371 P.2d 51 (1962) (due process violated when 12-year-old foster child denied attorney in mental health commitment proceeding).

[47] *See ABA Standards of Practice for Lawyers who Represent Children in Neglect and Abuse Cases*, *supra* note 13.

[48] Without counsel, a child who is subject to an erroneous TPR can also experience a tremendous impact on his or her physical liberty and familial bonds. *In re Welfare of A.B.*, 168 Wn.2d 908, 935, 232 P.3d 1104 (2010) (Chambers, J. and Alexander, J., dissenting) (reversing TPR and returning child to father "will wrench this child out of the only home she has ever known and deprive a brother of his sister").

[49] Andrew Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County (2008), available at* http://www.chapinhall.org/research/report/expediting-permanency (Finding that children with counsel experienced exits to permanent homes about 1.5 times more frequently than children who were not afforded counsel. Children with counsel also moved from case plan approval to permanency at approximately twice the rate of those without representation.). *See also* Taylor, *supra* note 12, at 615-16 ("Children who achieve permanency have better outcomes than those who languish in long-term foster care." These children are more likely to achieve higher educational gains, to be employed, and to have higher incomes and are less likely to be incarcerated, struggle with substance abuse issues or receive state aid than their counterparts who remain in foster care.).

legal training to protect these interests. Non-attorney GALs/CASAs cannot adequately protect those interests, as they "do not provide legal representation to a child." *Kenny A.*, 356 F. Supp. 2d at 1361.

Neither judges nor other parties are capable of performing these services for children. Juvenile court judges "cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances." *Id.* And, though the State and the parents share the child's interest in protecting his or her welfare and avoiding erroneous termination, their interests are not coterminous.[50]

Quite simply:

> [I]f the child is not represented by independent counsel, the child is caught in the middle while each attorney argues from his client's viewpoint. Although each side phrases arguments in terms of the child's best interests, each attorney desires to prevail for his client, who is not the child. But when the trial court appoints an attorney for the child, testimony is presented and cross-examination is done by an advocate whose only interest is the welfare of the child.

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[50] Parents' interests diverge from their children's from the moment a dependency order is entered—the children are alleged to be victims of abuse or neglect and may have interests different from that of their parents. *See Kenny A.*, 356 F. Supp. 2d at 1359 (there is an 'inherent conflict of interests' between a child and his parent or caretaker in a deprivation proceeding) (citing 1976 Op. Att'y Gen. No. 76-131 at 237). Thus, parents and/or their attorneys cannot mitigate the risk of error that children face in TPRs. *See also Santosky,* 455 U.S. at 761 (1982). Likewise, the State's interests diverge from the children's interests because the State has pecuniary, institutional and programmatic needs that may conflict with the specific needs of a child. *Kenny A.*, 356 F. Supp. 2d at 1359, n.6. *See also Lassiter*, 452 U.S. at 28 (State has pecuniary interest in avoiding expense of appointed counsel and lengthened proceedings caused thereby).

S.A.W., 856 P.2d at 289.[51] "[O]nly the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." *Kenny A.*, 356 F. Supp. 2d at 1361.

4. The Risk of Erroneous Deprivation of Children's Significant Liberty Interests in the Absence of Counsel Outweighs the Government's Burdens Associated with Appointment of Counsel

"In striking the appropriate due process balance, the final factor to be assessed is the public interest." *Mathews*, 424 U.S. at 347. "This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right," appointment of an attorney to all children in TPRs. *Id.*

"Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Id.* at 348. "Though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here ..." *Lassiter*, 452 U.S. at 28. In fact, the State's financial interest arguably

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[51] Similarly:

> Beneath each side's argument in terms of the best interests of the child, lies the desire to prevail for a client, who is not the child. When the court appoints an attorney for the child, testimony is presented and cross-examination done by an advocate who is only interested in the welfare of the child.

T.M.H., 613 P.2d at 470 (citing *Matter of Fish*, 174 Mont. 201, 569 P.2d 924 (1977); *Price v. Price*, 573 P.2d 251 (Okla. 1978) (specially concurring opinion)).

favors appointment of counsel, given that counsel for children can hasten permanency thus reducing children's time in foster care.[52]

Not only does Washington provide counsel to children in less invasive civil proceedings, it trails the national consensus on the right to counsel in TPRs.[53] Given that at least 40 states mandate appointment of counsel for children in dependencies and/or TPRs,[54] this State cannot say that the financial or administrative burden is so great that it overcomes the significant liberty interests at stake combined with the high risk of an erroneous deprivation of those interests.

Furthermore, "[a]s *parens patriae*, the government's *overriding interest* is to ensure that a child's safety and well-being are protected ... such protection can be adequately ensured only if the child is represented by legal counsel throughout the course of the deprivation and TPR proceedings." *Kenny A.*, 356 F. Supp. 2d at 1361 (emphasis added). Thus, both children's and the State's interests favor appointment of counsel.

D. THE *LASSITER* DECISION SUPPORTS A RIGHT TO COUNSEL FOR ALL CHILDREN IN TPRs

Although the U.S. Supreme Court in *Lassiter* held that the Due

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[52] *See* Zinn & Slowriver, *supra* note 49.

[53] *Appellant Child D.R.'s Opening Br.* at 39-42 (Ct. App. June 4, 2009).

[54] Taylor, *supra* note 12.

Process Clause of the 14th Amendment does not mandate appointment of counsel for parents in every TPR, the holding does not withstand scrutiny as to children. Applying the *Mathews* test, the *Lassiter* Court found that, although the State's interest did not outweigh a parent's fundamental interest in the companionship, care, and custody of his or her child, the risk of error without counsel would differ depending on the circumstances and the parent's abilities. 452 U.S. at 27-32. The Court thus adopted a case-by-case approach to determining whether counsel is constitutionally required for parents in TPRs. *Id.*

As the Court noted, "[t]he parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made." *Id.* at 30 (citing *Myricks*, 85 Wn.2d at 254). The Court also found that "the complexity of the proceeding and the incapacity of the uncounseled parent could be, *but would not always be*, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." *Id.* at 31 (emphasis added). Years before, the Washington Supreme Court, articulating the same concerns, held that appointment *was* required in all cases:

> [An indigent parent] often lacks formal education, and with

> difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.

Myricks, 85 Wn.2d at 254.

Unlike an adult parent whose capacity may vary, the incapacity of the uncounseled child *will always be* great enough to make the risk of an erroneous deprivation "insupportably high." By law, children lack capacity and "the experience, judgment, knowledge and resources to effectively assert their rights." *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998).[55] For any child, despite his or her level of maturity, a TPR will be overwhelmingly complex, no matter the number of expert witnesses. The unrepresented child cannot adequately challenge decisions of governmental authorities, decisions that affect the child's fundamental interests and present a substantial risk of loss. Undoubtedly, it is for these reasons that even Ms. Lassiter's child had an

[55] "Children are, by dint of their minority, typically seen as incompetent under the law." Pitchal, *supra* note 25, at 684.

attorney during the TPR, even though her mother did not.[56] The children of Washington State deserve no less.

E. CHILDREN HAVE AN INDEPENDENT RIGHT TO COUNSEL UNDER WASHINGTON'S DUE PROCESS CLAUSE

In 1974, noting that a parent's right to the care, custody and companionship of his or her children is a constitutionally protected liberty interest, this Court held that a "parent's right to counsel in [TPRs] is mandated by the constitutional guarantees of due process under the Fourteenth Amendment of the [U.S.] Constitution and Art. I, § 3 of the Washington Constitution." *Luscier*, 84 Wn.2d at 138. In 1975, this Court extended these guarantees to parents in dependencies where "the likelihood of eventual permanent deprivation is substantial." *Myricks*, 85 Wn.2d at 253. The Legislature codified these rights soon thereafter in RCW 13.34.090. Laws of 1977, 1st Ex. Sess., ch. 291, § 37.[57]

By judicial recognition of a constitutional due process right to counsel in dependencies and TPRs, and later legislative codification of those rights, Washington adopted a public policy requiring more

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[56] *Lassiter*, 452 U.S. at 29 (citing N.C.Gen.Stat. § 7A-289.29 (Supp.1979)).

[57] A few years later came the ruling in *Lassiter,* which found federal due process satisfied by appointment of counsel on a case-by-case basis, but merely set the floor and not the ceiling on due process standards in TPRs. The Court was clear that the many states already mandating appointment of counsel in these proceedings, like Washington, embodied nothing less than enlightened, wise and informed public policy. 452 U.S. at 34.

protection in the area of dependencies and TPRs than minimally required under federal law. And, jurisprudence thereafter shows that due process rights in this context flow from our state's due process clause, article I, section 3, not solely federal law.[58]

Other states have likewise determined that their state constitutions provide more protection than required under federal law in this context. For example, in *Matter of D.D.F.*, 801 P.2d 703 (Okla. 1990), the Oklahoma Supreme Court reconsidered, in light of *Lassiter,* the holding of *In re Chad S.*, 580 P.2d 983 (Okla.1978), that parents were automatically entitled to counsel in TPRs. Noting that *Lassiter* set the floor and not the ceiling, the *D.D.F.* court concluded:

> We continue to adhere to the philosophy enunciated in *Chad S.* Although the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution, Art. 2, § 7 ... The integrity of the family and "preservation of the parent-child relationship command the highest protection in our society."

Id. at 706. In 1983, the Alaska Supreme Court held that the Alaska state constitution guaranteed an indigent parent the right to counsel in TPRs.

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[58] "There is no presumption that the minimum degree of protection established by the federal constitution is the degree of protection to be afforded under the Washington Constitution." *State v. Reece*, 110 Wn.2d 766, 780, 757 P.2d 947 (1988).

V.F. v. State, 666 P.2d 42, 45 (Alaska 1983). Ten years later, the Montana Supreme Court also held that its due process clause, which is identical to Washington's, gives an indigent parent the right to counsel in TPRs. *Matter of A.S.A.*, 258 Mont. 194, 198, 852 P.2d 127 (Mont. 1993).[59]

In Washington, when considering whether a provision of the state constitution provides greater protection than its federal counterpart, courts engage in a two-step inquiry. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 596-97, 192 P.2d 306 (2008) (citing *Madison v. State,* 161 Wn.2d 85, 93, 163 P.3d 757 (2007) (plurality opinion)). First, courts determine "whether 'a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision.'" *Id.* (quoting *State v. McKinney,* 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). Next, courts determine whether the provision in question provides greater protection as applied in a particular context. *Madison,* 161 Wn.2d at 93-94. Normally, the first step is an analysis of the six nonexclusive factors established in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), which provide a set of interpretive tools to aid

[59] *See also Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993) (finding the North Dakota equal protection clause required appointment of counsel for indigent parents in TPRs); *Kenny A.*, 356 F. Supp. 2d 1353 (holding that children in deprivation proceedings have right to counsel under Georgia due process clause).

courts in "developing a sound basis for our state constitutional law." *State v. Weathered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988). A full *Gunwall* analysis is unnecessary, however, where precedent establishes "that a separate and independent analysis of a state constitutional provision is warranted." *Madison*, 161 Wn.2d at 93 n. 5.

1. Precedent Establishes That Washington's Due Process Clause Provides Greater Protection than Its Federal Counterpart Where Family Integrity is at Risk

On numerous occasions, Washington courts have found the state due process clause to be broader than its federal counterpart.[60] Indeed, prior to and since *Gunwall,* Washington courts have repeatedly held that Washington's Due Process Clause required the appointment of counsel where family integrity is at stake, demonstrating that Washington courts have established a precedent of independent constitutional analysis of the due process clause in TPRs and dependencies.

[60] While Washington's Due Process Clause has, in a few circumstances, been interpreted to be co-extensive with the federal Due Process Clause, none of these cases were in this context and thus are not determinative here. *See State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) (rejection of expansion of rights under a state constitutional provision does not foreclose an independent analysis in another). It is well established that federal courts do not limit state courts from according greater rights and that this Court need not limit its review to the federal due process clause nor "wait for the Supreme Court to clarify this concept." *State v. Chrisman,* 100 Wn.2d 814, 817-18, 676 P.2d 419 (1984); *State v. Bartholomew*, 101 Wn.2d 631, 637-38, 683 P.2d 1079 (1984). This is especially true here where there is no binding federal precedent on whether children in TPRs must be provided counsel.

As noted above, in two pre-*Lassiter* cases, *Luscier* and *Myricks*, this Court established the right to counsel for parents in TPRs and dependency proceedings. Over the years, Washington courts have reaffirmed the state constitutional basis of *Luscier* and *Myricks* despite the U.S. Supreme Court's 1981 decision in *Lassiter*. For example, in 1983, this Court refused to apply federal due process analysis to the issue of withdrawal of counsel during appeal in child deprivation cases. *In re Welfare of Hall*, 99 Wn.2d 842, 664 P.2d 1245 (1983). In the same year, the Court of Appeals, Division III, relying in part on *Luscier*, found the state's due process guarantee under article I, section 3 for effective assistance of counsel applies in civil TPR trials and "*exceed[s] federal guarantees under the Fourteenth Amendment*." *In re Mosley*, 34 Wn. App. 179, 183-84, 660 P.2d 315 (1983) (emphasis added). Even in *Gunwall*, this Court cited to *Myricks* as an example of a case in which an appellate court interpreted its "state constitution to provide greater protection for individual rights than does the [U.S.] Constitution." 106 Wn.2d at 59 n.3.

After *Gunwall* was decided, Washington courts continued to rely on state constitutional law in extending due process protections in cases where the parent-child relationship was at stake. *See Santos*, 104 Wn.2d 142 (relying on *Luscier* and *Myricks*, Court finds independent representation required in paternity actions); *Grove*, 127 Wn.2d 221

(extending right to counsel for indigent parents per *Luscier* and *Myricks* to include right to appeal at public expense).[61]

Because case law establishes that, from 1974 to 2007, Washington courts have interpreted the state due process clause independently from its federal counterpart where family integrity is at stake, no further *Gunwall* analysis is necessary to determine whether article I, section 3 may be applied independently. Nonetheless, such an analysis helps to determine "the scope of the broader protections" and its application in this context. *State v. White*, 135 Wn.2d 761, 769 n.7, 958 P.2d 982 (1998).[62]

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[61] *See also In re Welfare of J.D.*, 112 Wn.2d 164, 168, 769 P.2d 291 (1989) (indigent parents' right to counsel in dependency and TPRs is a constitutional right); *In re Dependency of J.H.*, 117 Wn.2d 460, 473-74, 815 P.2d 1380 (1991) (pursuant to *Myricks*, parents unquestionably have constitutional right to procedural due process where a child is involuntarily removed from their care); *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (right to counsel in TPRs "derives from the due process guaranties of article I, section 3 of the Washington Constitution as well as the Fourteenth Amendment."); *In re Welfare of G.E.*, 116 Wn. App. 326, 332 n.2, 333, 65 P.3d 1219 (2003) (in holding waiver of counsel in dependencies must be voluntary, knowing and intelligent, court relies on *Grove, Luscier* and *Myricks* for proposition that, unlike federal law, "Washington presumes that indigent parents in dependency and termination cases 'shall be provided' counsel at public expense"); and *Citizen v. Clark Cty. Bd. of Com'rs*, 127 Wn. App. 846, 851, 113 P.3d 501 (2005) (indigent parents have a constitutional right to appointment of counsel based on holdings in *Luscier* and *Myricks*).

[62] *See also Madison*, 161 Wn.2d at 93 n. 5 (Even where precedent establishes *Gunwall* is unnecessary, "parties may consider and brief the *Gunwall* factors as interpretive devices in support of our constitutional interpretation inquiry." *See* Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead-Long Live Gunwall!* ", 37 Rutgers L.J. 1169, 1179-1181 (2006)).

2. A *Gunwall* Analysis Supports a Finding that the State Due Process Clause Requires Appointment of Counsel to Children in TPRs

The six nonexclusive *Gunwall* factors are: (1) the textual language of the state constitution, (2) differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) structural differences between the federal and state constitutions, and (6) matters of particular state or local concern. 106 Wn.2d at 58.

a. Factors 1, 2 and 3: Textual Comparisons and History

While the *text* of article I, section 3 of the Washington Constitution is not meaningfully different from the 14th Amendment of the U.S. Constitution, this similarity does not foreclose a *Gunwall* analysis. *State v. Ortiz*, 119 Wn.2d 294, 319, 831 P.2d 1060 (1992) (Johnson, J., dissenting); *City of Seattle v. Duncan*, 44 Wn. App. 735, 742-43, 723 P.2d 1156 (1986). Indeed, Washington courts have held that these two provisions will be interpreted differently if there are "compelling rationales" for doing so. *Duncan*, 44 Wn. App. at 743.

In determining what bearing identical provisions may have on the *Gunwall* analysis, courts look to the framer's intent. *Gunwall*, 106 Wn.2d at 61 (history of the adoption of particular provision may reveal an intent that supports independent reading). Unless historical evidence shows

otherwise, the Washington Due Process Clause should be interpreted independently.[63]

The Washington Constitution, and specifically the Declaration of Rights, as well as the Oregon Constitution, were modeled not after the federal constitution but after the Indiana Constitution.[64] The framers of these various state constitutions "intended their charters as the primary devices to protect individual rights," and the federal Bill of Rights at that time "was perceived as a secondary layer of protection, applying only against the federal government."[65]

b. Factor 4: Preexisting State Law

"State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established." *Gunwall*, 106 Wn.2d at 61-62. This Court has said that application of this factor is "generally unique to the context in which the

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[63] Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491, 514-16 (1984).

[64] Justice Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635, 635 n. 1 (1987) ("In choosing this model, rather than the federal Bill of Rights, Oregon and Washington continued a long tradition of states taking their bills of rights from preexisting state constitutions.")

[65] *Id.* at 636.

interpretation question arises" and requires the court to examine "the [fourth factor] in light of the new context presented." *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994). As shown above, over 30 years of precedent establishes that the state's due process clause provides more protection in cases involving family integrity than the federal approach.

c. Factor 5: Structural Differences

"The framers of the [U.S.] Constitution designed a compound American republic, in which the people surrendered power to dual sovereign governments—state and federal."[66] "By choosing this 'classical model' of federalism, the framers intended to provide double security for the people's individual rights."[67] Thus, "when a state court fails to independently evaluate its state constitution, it deprives the people of the double security the nation's founding fathers intended to provide."[68]

Unlike the federal constitution, the state constitution guarantees fundamental rights rather than restricts them and, as such, points toward

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[66] Utter & Pitler, *supra* note 64, at 643 (citing *The Federalist No. 51*, at 339 (A. Hamilton or J. Madison) (modern Library ed. 1937)).

[67] *Id.* at 643 (citing Glen S. Goodnough, *Comment, The Primacy Method of State Constitutional Decision-making: Interpreting the Maine Constitution*, 38 Me. L.Rev. 491, 503 n.37 (1986)).

[68] *Id.*

broader independent protections. *Gunwall*, 106 Wn.2d at 66.[69] Further, the fact that the Declaration of Rights is the first section of the state's constitution indicates that its primary purpose is to protect individual rights against government intrusion.[70] Indeed, the very first section of article I provides that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established *to protect and maintain individual rights*." Const. art. I, § 1 (emphasis added).

Later sections also highlight the state constitution's commitment to the protection of individual liberty beyond that afforded by the federal constitution. For example, article I, section 3 encompasses and exceeds guarantees under the 14th Amendment in some contexts. *See Mosley*, 34 Wn. App. at 183-84 (state due process clause requires effective assistance of counsel for parents at risk of losing parental rights); *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (state due process clause is more protective of individual rights than its federal counterpart as applied to the use of post-arrest silence against a juvenile at trial). The

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[69] See *also State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (differences in structure between the federal and state constitutions always point toward interpreting the Washington Constitution as being more protective of individual rights than the federal).

[70] Spitzer, *supra* note 62, at 1192 (citing *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002) (Sanders, J. dissenting)).

individual protections afforded by article I, section 7 governing searches and seizures also encompass and exceed those of the Fourth Amendment. *State v. Horace*, 144 Wn.2d 386, 28 P.3d 753 (2001).

The language of article I, section 9 also indicates an intent to provide more individual protection as it prohibits citizens from being compelled to give "evidence" against themselves, while the U.S. Constitution merely forbids compelling a citizen to be a "witness" against himself. U.S. Const. amend. V. Similarly, the Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual" punishment, while article I, section 14 prohibits punishments that are "cruel," no matter how usual.

d. Factor 6: Matters of State or Local Concern

Issues of parental rights, child custody and family relations are matters inherently of state or local concern. *In re Custody of R.R.B.*, 108 Wn. App. 602, 620, 31 P.3d 1212 (2001) (citing *Rose v. Rose*, 481 U.S. 619, 625, 107 S.Ct. 2029, 95 L. Ed. 2d 599 (1987)).[71] Also, the treatment of juveniles "is a subject of local concern" which "may be more appropriately addressed by resorting to the state constitution." *State v. Smith*, 117 Wn.2d 263, 286-87, 814 P.2d 652 (1991) (Utter, J.,

[71] *See also Ex parte Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 34 L. Ed. 500 (1890) ("[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.").

concurring). Further, the strong history in variation regarding procedural matters among the states coupled with *Lassiter's* recommendation that states develop *their own* policies regarding the right to counsel indicates this issue is of state or local concern. *See Lassiter*, 452 U.S. at 33.

Finally, Washington's constitution, unlike the federal, twice references the care of children, providing more evidence that this is an issue of state or local concern. Article IX, section 1 provides that it is the "paramount duty of the state to make ample provision for the education of all children residing within its borders. . . " And article XIII, section 1 requires the state to foster and support institutions for the benefit of youth who have physical or developmental disabilities or mental illness and "other such institutions as the public good may require."

e. Gunwall Analysis

Application of these factors to the issue on review before this Court supports a right to counsel for Washington's foster children involved in TPRs. While the state and federal texts are almost identical, state history indicates a broader reading was intended to protect individual rights not protected by the federal constitution. Moreover, as argued herein, there are compelling rationales for extending the same, if not stronger, due process protections provided to parents in TPRs to children given the unique vulnerability of children. Existing case law also shows

that this state rejected the narrower federal construction under *Lassiter* and instead has consistently adhered to the holdings in *Luscier* and *Myricks* by providing more due process protection where family liberty interests are at stake.

No one would argue today that this Court should relegate children to the status of "chattel to be given to the winner of an adversary proceeding." *In re Guardianship of Palmer*, 81 Wn.2d 604, 607, 503 P.2d 464 (1972). Instead, the trend is for a "greater recognition" of the fact that children "are not chattels or playthings or mere desiderata but have rights of their own which should be protected." *In re Welfare of Ferguson*, 41 Wn. App. 1, 7-8, 701 P.2d 513 (1985) (quoting *In re Clark*, 26 Wn. App. 832, 839, 611 P.2d 1343 (1980)). Unfortunately, without counsel, children in TPRs are given an inferior status wherein they are rendered even more "vulnerable ... powerless and voiceless." *In re Parentage of L.B.*, 155 Wn.2d at 712 n. 29. This falls below the due process guarantees mandated by Washington's Due Process Clause.

F. PROTECTION OF CHILDREN'S SUBSTANTIVE DUE PROCESS RIGHTS REQUIRES APPOINTMENT OF COUNSEL

Separate from their procedural due process rights, "foster children possess substantive due process rights that the State, in its exercise of executive authority, is bound to respect." *Braam*, 150 Wn.2d at 698. This

Court further explained that "[t]o be reasonably safe, the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child." *Id.* at 700.

As part of the state's dependency and TPR process, juvenile courts must ensure protection of those substantive due process rights. Without attorneys, there can be no assurance that the State will provide adequate services to dependent children. As has been alleged in this case, in *Braam*, and by amici in support of the Children's Motion for Discretionary Review, when the State fails to provide those services, attorneys for children can use their legal skills to ensure the State meets the needs of the children, whose constitutional rights it is "bound to respect." *Id.* at 698.

The critical role of attorneys in protecting the rights of foster children was made even more clear in this Court's dismissal of claims under Washington State statutes in *Braam*. While finding that RCW 74.14A.050(2), (3), RCW 74.13.250 and .280 were created for the "especial benefit of foster children," this Court held that "parties believing themselves aggrieved by DSHS's failure to abide by these statutes, including a foster child through an attorney or guardian ad litem, will have an opportunity to raise the issue *in the context of a dependency action.*" *Id.* at 712 (emphasis added). The case at bar demonstrates that children who

are not represented by an attorney will not, in fact, have the opportunity to challenge the denial of rights and services under these statutes, and the myriad other statutes created for their *especial* benefit. A lay advocate, who can help a child in a number of meaningful ways, cannot adequately protect a child's rights under state or federal law and cannot ensure that a child's substantive due process rights are protected.

G. THE EXPERIENCES OF D.R. AND A.R. MIRROR THOSE OF THOUSANDS OF FOSTER CHILDREN EVERY YEAR

The State, in conceding the failure to appoint counsel for the Children was error, made a powerful statement about the complex legal situations faced by children in TPRs. Not only did the State concede that, without counsel, the Children were "not able to adequately present a legal argument to the court opposing termination..." it further conceded that the CASA did not understand "the legal impact termination would have on the [Children]." Mot. to Reverse and Remand 2-3. Moreover, the State conceded the Children had legal interests at stake beyond the termination itself. *Id.* at 3. Although the State did not enumerate what other legal interests were at stake for D.R. in the termination other than her "best interests," it recognized A.R.'s legal interests were "significant" and included "issues related to his in-patient mental health treatment and designation and treatment as a sexually aggressive youth..." *Id.* Ultimately,

the State conceded that the failure to appoint counsel "was not harmless" and "the lack of counsel may have affected the outcome of the case." *Id.*

This case is not unique.[72] In TPRs, children have numerous legal interests that are always at stake, including the legal impact of termination, continuity of relationships, and access to adequate education, appropriate physical and mental health care, and stable and permanent homes. As in this case, such interests can never be adequately protected without counsel. Here, the State's failure to provide adequate services jeopardized D.R.'s academic progress, A.R.'s mental health, and ultimately the Children's relationship with each other and their mother.

While many children in the State's care experience inadequate mental health treatment, academic failure, and separation from their siblings without regular visits or contact,[73] *all* children in TPRs face the permanent loss of family, "the core element upon which modern civilization is founded," the integrity of which has been traditionally "zealously guarded by the courts." *Luscier*, 84 Wn.2d at 136.

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[72] The fact that the request for counsel was preserved for appeal is, however, unique.

[73] Doyle, *supra* note 38; Burley, *supra* note 38; *Braam* Oversight Panel, *supra* note 40. Data about sibling placement and visits *available at* http://www.braampanel.org/MonRptMar10.pdf, at 47-49.

V. CONCLUSION

Without an effective legal advocate, children such as D.R and A.R. are at risk, not only of harm while in state custody, but of that harm directly contributing to the termination of parental rights. In the absence of counsel for children, trial courts lack the information necessary to make what is arguably the most important decision in a child's life—who will be that child's family forever.

For the foregoing reasons, the Children request this Court hold that the Due Process Clauses of the Washington State and United States Constitutions require appointment of counsel for all children in termination proceedings. The Children also request an award of fees and costs as authorized by Chapter 4.84 RCW, RCW 4.48.330, 42 U.S.C. §§ 1983 and 1988, RAP 18.1 and/or any other applicable law.

Respectfully submitted this 27th day of August 2010,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury and the laws of the State of Washington that the following statements are true:

1. On August 27, 2010, I caused to be served a true and correct copy of the Children's Joint Opening Brief, by sending it via office e-mail to the following:

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